

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged: Amended Statement of Facts, Issues and Contentions

File Number: ACT1 of 2019

File Title: Re Application for authorisation AA1000439 lodged by Australian Energy Council, Clean Energy Council, Smart Energy Council and Energy Consumers Australia in respect of the New Energy Tech Consumer Code and the determination made by the ACCC on 5 December 2019

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

DEPUTY REGISTRAR

Dated: 17/04/2020 2:20 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2019

Re: Re Application for authorisation AA1000439 lodged by Australian Energy Council, Clean Energy Council, Smart Energy Council and Energy Consumers Australia in respect of the New Energy Tech Consumer Code

Applicant: Flexigroup Limited [ACN 122 574 583]

**THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION'S AMENDED
STATEMENT OF FACTS, ISSUES AND CONTENTIONS**

PART I FACTS

A. OVERVIEW OF THE PROCEEDING

1. This proceeding is an application for review, under s 101 of the *Competition and Consumer Act 2010 (Cth)* (**CCA**), of a determination by the Australian Competition and Consumer Commission (**ACCC**) under s 88(1) to authorise the making and implementation of The New Energy Tech Consumer Code (variously described as the **NETCC**, the **Consumer Code** or the **Code**).
2. The ACCC granted conditional authorisation for the conduct outlined in the Consumer Code, in the form submitted to the ACCC on 11 November 2019, for a period of 5 years.
3. The review to be conducted by the Australian Competition Tribunal (**Tribunal**) is a re-hearing of the matter.
4. The ACCC's function in this proceeding is to assist the Tribunal to reach, in the public interest, the correct or preferable decision in the review.

B. PRINCIPAL PARTIES INVOLVED IN THE PROCEEDING

5. Four bodies collectively applied to the ACCC for authorisation: the Clean Energy Council, the Australian Energy Council, the Smart Energy Council and Energy Consumers Australia (the **Authorisation Applicants**).¹ These bodies are described in the Authorisation Applicants' Statement of Facts, Issues and Contentions at [1]-[4] (**Authorisation Applicants' SOFIC**). The Authorisation Applicants did not apply to the Tribunal for review of the ACCC's determination.

¹ Application AA1000439 lodged on 29 April 2019.

6. The applicant for review is Flexigroup Limited (**Flexigroup**). Flexigroup was a participant in the ACCC's public consultation in respect of the Authorisation Applicants' application to the ACCC. Flexigroup is described in the Applicant's Statement of Facts, Issues and Contentions at [1]-[6] (**Flexigroup ASOFIC**).
7. The ACCC is responsible for the enforcement of the CCA. Under s 88 of the CCA, it has the power to determine whether to grant an authorisation to a person to engage in conduct that would or might contravene a provision of Part IV of the CCA. Once a person applies to the Tribunal for review of the ACCC's determination, for the purposes of the review the Tribunal may perform all the functions and exercise all the powers of the ACCC. The ACCC's role is to assist the Tribunal. The scope of that role varies depending on the positions taken by other parties to the review.
8. Three entities have been granted leave to intervene in these proceedings. They are:
 - 8.1. the Australian Securities and Investments Commission (**ASIC**);
 - 8.2. Consumer Action Law Centre (**CALC**), an independent, not-for-profit consumer organisation with specialist expertise in consumer credit law and policy; and
 - 8.3. RateSetter Australia RE Limited (**Ratesetter**), a large Australian provider of regulated consumer credit for the purpose of funding solar and other renewable energy products.

C. INDUSTRY BACKGROUND

9. New Energy Tech (**NET**) products are defined at Part C of the Consumer Code as being:
 - 9.1. small-scale (in-home or small business) products and systems that generate, store or trade energy away from Australia's main transmission and distribution Energy Networks² or as distributed energy resources connected to an Energy Network;
 - 9.2. services that support or are closely related to those products or systems;
 - 9.3. products, systems and services that monitor or manage a Customer's³ usage of energy whether on or off an Energy Network;
 - 9.4. any other product, system and service that the Administrator⁴ is satisfied is appropriately within the Code.

² Defined in Part C of the Consumer Code as meaning: "any of Australia's principal energy transmission and distribution networks (including South West Interconnected System, North West Interconnected System, Darwin-Katherine Electricity Network, National Electricity Market)."

³ Defined at Part C of the Consumer Code as meaning: "a potential or existing Residential Customer or Small Business Customer. The term also includes other customers if their contract expressly includes that this Code applies."

⁴ Defined at Part C of the Consumer Code as meaning: "is the organisation with responsibility for administering the Code as set out in the Annexure – Code Administration."

10. NET does not include simple, low cost or off-the-shelf New Energy Tech that is within a class exemption made by the Administrator in accordance with the Code.
11. BNPL finance is not subject to regulation under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) or the National Credit Code (**NCC**) where providers operate in accordance with the exemption stated in [cls 6\(5\)](#) of the **NCCPA**.⁵ Accordingly, BNPL providers are not required to hold an Australian Credit Licence to offer BNPL products or to conduct a responsible lending assessment in accordance with the obligations contained in the **NCCPA** in offering BNPL finance products.⁶
12. By contrast, credit providers offering products that *are* regulated by the **NCCPA** and the **NCC** are required to hold an Australian Credit Licence and must conduct a responsible lending assessment in accordance with the obligations contained in the **NCCPA** in offering finance products. They must also comply with certain dispute resolution and hardship provision requirements to protect consumers dealing with regulated credit products offered through licensed credit providers.⁷
13. Regulation 23 of the *National Consumer Credit Protection Regulations 2010* (Cth) exempts retailers, including NET retailers, who are engaging in a credit activity from having to hold an Australian Credit Licence.⁸ Regulation 23(4) states that the exemption does not apply “if the person supplies goods or services to the consumer as a result of unsolicited contact with the consumer”.⁹ “Unsolicited contact” in that context refers to the *unsolicited sale of the goods and services* in question, not the *unsolicited offer of the finance product* used to fund the purchase of the goods and services.
14. Because BNPL products are not covered by the **NCCPA** and the **NCC**, retailers are not required to hold an Australian Credit Licence in order to offer BNPL finance in an unsolicited sale. If a retailer sought to offer regulated credit products during an unsolicited sale, it would be required to hold an Australian Credit Licence.
15. In an unsolicited sale where the finance offered is a regulated credit product (i.e. provided by a licenced credit provider), a responsible lending assessment must be undertaken in accordance with the obligations contained in the **NCCPA** and the **NCC**. Mandatory dispute resolution mechanisms and hardship provisions also apply.
16. In November 2018, ASIC released its Report 600 review into BNPL arrangements. ASIC stated that “it may be that BNPL providers should be required to comply with the National Credit Act. ASIC has not yet formed a view that this is necessary. [ASIC’s] ongoing monitoring of this industry ... will help [ASIC] to assess whether [it] should advise the

⁵ Flexigroup [ASOFIC \[26\]-\[27\]](#); Authorisation Applicants’ SOFIC at [16].

⁶ Authorisation Applicants’ SOFIC [18].

⁷ Authorisation Applicants’ SOFIC at [42] and footnote 16.

⁸ Authorisation Applicants’ SOFIC [42] and footnote 16. An example of such a credit activity is a retailer, on behalf of a relevant credit provider for a credit contract or proposed credit contract, performing the obligations or exercising the rights of the relevant credit provider in relation to the contract or proposed contract.

⁹ *National Consumer Credit Protection Regulations 2010* (Cth) reg 23.

Government to consider further law reform".¹⁰ ASIC's SOFIC at [5]-[6] addresses this Report and the position adopted by ASIC therein.

D. THE CONDUCT SOUGHT TO BE AUTHORISED

17. The Authorisation Applicants sought authorisation from the ACCC on the basis that giving effect to the Consumer Code may:
 - 17.1. involve a cartel provision within the meaning of Division 1 of Part IV of the CCA;
 - 17.2. substantially lessen competition within the meaning of ss 45 and 46 of the CCA; and/or
 - 17.3. constitute exclusive dealing within the meaning of s 47 of the CCA.
18. During the ACCC's assessment of the application for authorisation, the Authorisation Applicants provided a number of amended versions of the Consumer Code. They provided a final version of the Consumer Code to the ACCC on 11 November 2019 (**Attachment A**). That identifies the conduct in respect of which the Authorisation Applicants sought authorisation, and it is that version of the Consumer Code that is the subject of this review.¹¹

E. THE ACCC DETERMINATION

E.1 Overview

19. On 5 December 2019, the ACCC issued a final determination in respect of the conduct outlined in the Consumer Code as submitted on 11 November 2019,¹² granting conditional authorisation for a period of 5 years (the **ACCC Determination**).
20. The *conduct* that the ACCC authorised enables the Authorisation Applicants, and future signatories to the Consumer Code, to agree, sign up to and comply with (give effect to) provisions of the Consumer Code:
 - 20.1. according to which signatories will commit to abide by minimum standards of good practice as set out in the Consumer Code, which are intended to cover all aspects of the customer experience;
 - 20.2. for monitoring and sanctioning non-compliance, where the Code Administrator has powers requiring a signatory to rectify issues giving rise to a breach of the Consumer Code, and, where there is serious non-compliance, the Code Administrator may propose to the Code Monitoring and Compliance Panel that the signatory should be suspended or expelled;

¹⁰ ASIC's SOFIC at [5].

¹¹ The form in Attachment A is the same as Annexure B to the ACCC's decision, and is the **November Version** to which the Authorisation Applicant's refer: Authorisation Applicants' SOFIC at [23].

¹² Unless otherwise stated, from this page onwards a reference to the Consumer Code and/or its provisions is intended as a reference to the version of the Consumer Code submitted to the ACCC on 11 November 2019.

- 20.3. requiring signatories to offer only deferred payment arrangements that are regulated under the NCCPA and the NCC, and are provided by credit providers licensed under the NCCPA, or to offer deferred payment arrangements that are provided by BNPL providers only in certain circumstances, (together the **Proposed Conduct**).
21. It is important to identify the Proposed Conduct with precision, because the process of authorisation concerns the granting of permission to a person to engage in particular *conduct*. This can be contrasted with the effect of the ACCC Determination, which was to grant authorisation to the Proposed Conduct subject to conditions that alter the Proposed Conduct to the extent of those conditions.
22. In summary terms, the conditions that were imposed in the ACCC Determination relate to:
- 22.1. variations to the requirements that BNPL finance providers must meet under clause 25 of the Consumer Code in order for signatories to offer finance arrangements to consumers (the **BNPL Finance Requirement Condition**);¹³
- 22.2. the prohibition of unsolicited offers of BNPL finance in clause 3(d) of the Consumer Code (the **Clarification on Unsolicited Offers Condition**);¹⁴
- 22.3. a requirement to report to the ACCC on the operation of the Consumer Code (the **Reporting Condition**).¹⁵

E.2 BNPL Finance Requirement Condition

23. The BNPL Finance Requirement Condition amends the Consumer Code requirements that BNPL providers must satisfy in order for signatory retailers to be able to offer those BNPL finance arrangements to consumers. Some of these amendments reduce, and others raise, the requirements that BNPL providers must satisfy relative to the requirements of the Consumer Code.
24. The BNPL Finance Requirement Condition *reduces* the standards required of BNPL providers under the Consumer Code by:
- 24.1. removing the requirement that BNPL providers must hold an Australian Credit Licence or be a related body corporate of a credit provider licenced under the NCCPA;
- 24.2. requiring BNPL providers to undertake a responsible lending assessment of the suitability of a loan and a customer's ability to repay it, providing *substantially equivalent protections* to specific provisions contained in the NCCPA, rather than strict compliance with those specific provisions in the NCCPA and NCC;
- 24.3. requiring BNPL providers to provide information to assist customers in assessing the BNPL product, including the credit provider's fees and charges, rather than all disclosures that are required of licenced credit providers under the NCC.

¹³ ACCC Determination at [5.12], [5.14] and Attachment A.

¹⁴ ACCC Determination at [5.13].

¹⁵ ACCC Determination at [5.15]-[5.18].

25. The BNPL Finance Requirement Condition *raises* the standards required of BNPL providers by:
- 25.1. requiring a BNPL provider's internal dispute resolution procedure to comply with the standard specified in ASIC Regulatory Guide 165;
 - 25.2. requiring BNPL providers to comply with ss 72, 88 and 89A of the NCC in dealing with customers experiencing hardship.

E.3 The Clarification on Unsolicited Offers Condition

26. The Clarification on Unsolicited Offers Condition imposed in relation to clause 3(d) of the Consumer Code clarifies its intended operation and requires signatories to the Consumer Code not to offer BNPL finance (whether unsolicited or not) if the sale of the NET product is unsolicited.
27. Clause 3 of the Consumer Code as submitted to the ACCC already provided as follows:

Our advertisements and other promotional material will not include any false or misleading claims about us or our New Energy Tech. In particular, our advertisements and promotional material will:

...

- (d) make no unsolicited offers of payment arrangements not regulated by the [NCCPA].

E.4 The Reporting Condition

28. The Reporting Condition requires the Code Administrator to report to the ACCC on the operation of the Consumer Code.

F. THE APPLICATION FOR REVIEW

29. On 30 December 2019, Flexigroup applied to the Tribunal for a review of the ACCC Determination.

PART II ISSUES

A. GENERAL ISSUES

30. The two general issues that arise for determination by the Tribunal are as follows.
31. **Issue One:** Can the Tribunal be satisfied in all the circumstances that:
- 31.1. the Proposed Conduct would result, or be likely to result, in a benefit to the public; and
 - 31.2. such public benefit would outweigh the detriment to the public that would result, or be likely to result, from the Proposed Conduct?

32. This issue arises because the Tribunal cannot, under s 90(7)(b) of the CCA, authorise the Proposed Conduct unless it is so satisfied. (Section 90(7)(a) sets out an alternative basis upon which conduct can be authorised, which is not relevant to this review.)
33. **Issue Two:** If the Tribunal determines to grant an authorisation for the Proposed Conduct, should it attach any condition to the authorisation and, if so, what condition(s)? This issue arises because s 88(3) of the CCA permits the ACCC, and the Tribunal by the operation of s 102 of the CCA, to specify conditions in the authorisation.

B. SPECIFIC ISSUES

34. The following specific issues emerge from the SOFICs filed by the parties.
35. **First**, how does the Tribunal properly exercise its function in this review? For example, is the Tribunal, as Flexigroup suggests, to compare authorisation of the Proposed Conduct with and without certain of the conditions imposed by the ACCC?
36. **Secondly**, in assessing public benefits and detriments, what is the relevant market(s) in which to assess the competitive effects of the Proposed Conduct?
37. **Thirdly**, what are the likely public benefits of the Proposed Conduct?
 - 37.1. Is there likely to be a public benefit in imposing higher standards on BNPL finance arrangements that go beyond what is currently required by the general law?
 - 37.2. Is there likely to be a public benefit in preventing NET retailers from making unsolicited offers of BNPL finance?
 - 37.3. Is there likely to be a public benefit in preventing retailers from offering BNPL finance in unsolicited sales of NET products and services?
 - 37.4. Is there likely to be a public benefit in including additional consumer protection provisions in the Consumer Code beyond those currently required by the general law?
 - 37.5. If any of the public benefits are likely, are these achieved by the provisions of the Consumer Code, and in particular, by clause 3(d)?
 - 37.6. Does clause 3(d) require signatory retailers not to offer BNPL finance during unsolicited sales of NET products and services?
 - 37.7. Does the Consumer Code reduce information asymmetry experienced by consumers and, if so, is reduced information asymmetry a public benefit?
 - 37.8. Are there any other public benefits?
38. **Fourthly**, what are the likely public detriments of the Proposed Conduct?
 - 38.1. Is there likely to be a loss of consumer choice of finance arrangements available as a result of the requirement imposed on BNPL providers to hold an Australian Credit Licence under the Consumer Code?

- 38.2. Is there likely to be a loss of consumer choice of finance arrangements available as a result of the requirements to comply strictly with responsible lending and disclosure of information requirements equivalent to those in the NCCPA and NCC, under the Consumer Code?
- 38.3. Is there likely to be a loss of consumer choice of finance arrangements available as a result of the requirement in clause 3(d) of the Consumer Code?
- 38.4. Is there an anti-competitive detriment arising out of the restrictions imposed on the offering of BNPL deferred payment arrangements in the Consumer Code?
- 38.5. Is there an anti-competitive detriment arising from the conduct outlined in clause 3(d) of the Consumer Code?
- 38.6. Is there a risk of consumer harm, in relation to the offer of BNPL finance in the context of unsolicited sales of NET products and services that is not addressed by clause 3(d) of the Consumer Code?
- 38.7. Is there a public detriment in allowing signatories to the Consumer Code to agree and give effect to consistent business practices?
- 38.8. Is there a public detriment arising from provisions of the Consumer Code allowing for suspensions and expulsions and denied membership under the Consumer Code?
- 38.9. Are there any other public detriments?
39. **Fifthly**, how should the benefits and detriments be balanced? Is the net public benefits test in s 90(7)(b) met by the Proposed Conduct?
40. **Sixthly**, what, if any, conditions should be imposed?
- 40.1. When can or should conditions be imposed (put another way, for what purpose can, or should, conditions be imposed)?
- 40.2. If the likely benefits do not outweigh the likely detriments, are there one or more conditions that may be imposed to vary the conduct for which authorisation is sought sufficient to:
- 40.2.1. yield the requisite public benefit; or
- 40.2.2. increase the likelihood of the public benefit eventuating to a sufficient level?
- If so what are those conditions?
- 40.3. If the likely benefits outweigh the likely detriments, are there one or more conditions that may be imposed without which the Tribunal would not be prepared to exercise its discretion in favour of authorisation? If so, what are those conditions?

40.4. What material must be adduced by any interested party with respect to each of the conditions sought in order to persuade the Tribunal to impose it?¹⁶

41. **Seventhly**, if authorisation is granted, what is the appropriate period of authorisation?

42. **Finally**, based on the answers to the above questions, should the Tribunal affirm, set aside, or vary the determination of the ACCC in respect of the Consumer Code?¹⁷

PART III CONTENTIONS

A. THE TRIBUNAL'S FUNCTION

A.1 Applicable Principles

43. Section 101(2) provides that this review by the Tribunal under s 101(1) is a re-hearing of the matter. In performing this re-hearing function, the Tribunal must apply s 90(7) of the CCA. Section 90(7)(b) provides that authorisation must not be granted unless the Tribunal is satisfied in all the circumstances that:

- (i) the conduct would result, or be likely to result, in a benefit to the public; and
- (ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

44. The power to grant authorisation is discretionary.¹⁸ In exercising that discretion, the Tribunal may have regard to considerations relevant to the objectives of the Act.¹⁹

45. The Tribunal must undertake a complete rehearing of the application for authorisation based on the material before it.²⁰ It is not the Tribunal's role merely to resolve issues in dispute between the parties.²¹ Nor is it the Tribunal's role to engage only in a confined inquiry as to the appropriateness of specific conditions imposed by the ACCC or proposed by a party.²² The Tribunal must engage in a re-hearing in the fullest sense and reach its own conclusions

¹⁶ While technical rules concerning the onus of proof are misplaced in administrative decision-making (*McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 356.9, 366.8, 369) questions will arise as to which party must adduce what evidence in order to persuade the Tribunal to make the decision it seeks. This is sometimes framed as the "burden of persuasion" (*Comcare v Power* (2015) 238 FCR 187) or as a "practical onus" (*Brackenreg v Comcare* (2010) 187 FCR 209).

¹⁷ CCA s 102(1).

¹⁸ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,517 [106].

¹⁹ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,522 [126].

²⁰ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,524 [135], [138].

²¹ *Re 7-Eleven Stores Pty Ltd* [1998] ATPR ¶41-666 at 41,453.

²² While the Tribunal may have regard to any conditions imposed by the Commission or alternative conditions proposed by the parties, the Tribunal has stated that "[t]he necessity for or appropriateness of the ACCC's condition is not a point of departure in the review process": *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,524 [139].

on the material before it,²³ rather than examining factual or other conclusions reached by the ACCC.

46. The Tribunal's review is not a review of whether what the ACCC had determined was right or wrong on the material before it.²⁴ It is the ACCC Determination, not the published reasons, which is the subject of review before the Tribunal.²⁵

A.2 The ACCC's Contentions

47. On the basis of the SOFICs filed, there appears to be no dispute that the Tribunal can be satisfied of s 90(7)(b) in respect of the Proposed Conduct.²⁶ Identification of the precise benefits and detriments (or *likely* benefits and detriments) of the Proposed Conduct is nonetheless important, because these may influence the Tribunal's consideration of its discretion and the content of any conditions the Tribunal may consider it appropriate to specify.
48. In applying the statutory test for authorisation, the Tribunal compares: (a) the likely future with the conduct for which authorisation is sought, with (b) the likely future without such conduct.²⁷ This is not the same as comparing a future in which the proposed conduct is authorised against a future in which it is not authorised.²⁸
49. Neither Flexigroup nor the Authorisation Applicants adopt the correct comparison. Flexigroup suggests that the Tribunal should compare the NETCC with the BNPL Finance Requirement Condition and the Clarification on Unsolicited Offers Condition against the NETCC without those conditions or with different conditions.²⁹ The Authorisation Applicants suggest that the Tribunal should compare the conduct set out in the NETCC without conditions against that of the NETCC with different conditions.³⁰ The correct comparison is to compare the likely future with the conduct the subject of the authorisation with the likely future without such conduct.

B. THE RELEVANT MARKET

B.1 Applicable Principles

50. A market is an area or space of close competition between firms or the field of rivalry between them.³¹

²³ CCA s 101(2); *Re Media Council of Australia (No 2)* (1987) 88 FLR 1; *Re 7-Eleven Stores Pty Ltd* (1994) ATPR ¶41-357 at 42, [655654](#); *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,524 [138].

²⁴ *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281 at 295-296.

²⁵ *Re Applications by Australasian Performing Right Association Ltd* [1999] ACompT 3 at [27].

²⁶ [However, Flexigroup seeks to have the Tribunal remove clause 3\(d\) of the Consumer Code in its entirety as a condition of authorisation as outlined in paragraph 95 below.](#)

²⁷ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,520 [117]; *Re 7-Eleven Stores Pty Ltd* [1998] ATPR ¶41-666 at 41-453.

²⁸ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,521 [120]-[121].

²⁹ Flexigroup [ASOFIC](#) at [43], Authorisation Applicants' SOFIC at [31].

³⁰ Authorisation Applicant's SOFIC at [31].

³¹ *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 at 190, referred to with approval in *Boral Besser Masonry Ltd v Australian Competition & Consumer Commission* (2002) 215 CLR 374 at 422 [133] (Gleeson CJ and Callinan J), 454-455 [248] (McHugh J); *Australian Competition and*

51. Market definition is a purposive exercise that focuses analysis, situating alleged contravening conduct in the context of a particular statutory prohibition and an area of competitive activity, by reference to the four dimensions of product, geography, functional level and time.³²

B.2 The ACCC's contentions

52. The participants in the review have not disputed the relevant areas of competition identified in the ACCC Determination. The ACCC identified the following as relevant areas of competition likely to be affected by the implementation of the Consumer Code and conduct for which authorisation was sought:

52.1. the supply of different types of NET products and services;

52.2. financial products, including particularly deferred payment arrangements, offered with NET products and services.

C. BENEFITS AND DETRIMENTS

C.1 Applicable Principles

53. In assessing the application for authorisation, the Tribunal applies the net public benefit test under s 90(7)(b). The Tribunal will consider the likely public benefits and detriments flowing from the conduct for which authorisation is sought.
54. The CCA does not define "public benefit". The term should be given its widest possible meaning, and includes "anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress".³³
55. The CCA likewise does not define "public detriment". The Tribunal has previously described it as "any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency".³⁴
56. For a benefit or detriment to be taken into account, the Tribunal must be satisfied that the benefit or detriment is "likely" in the sense that there is a real chance, and not a mere possibility, of it eventuating. A speculative or a theoretical possibility will not suffice.³⁵

Consumer Commission v Flight Centre Travel Group Pty Ltd (2016) 261 CLR 203 at 227 [66] (Kiefel and Gageler JJ).

³² *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] ATPR ¶42-123 at 45,243 [429] (Allsop J); *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 187 (Mason CJ and Wilson J); *Australian Competition and Consumer Commission v P.T. Garuda Indonesia Ltd* (2016) 244 FCR 190 at [110] (Dowsett and Edelman JJ).

³³ *Queensland Co-operative Milling Association Ltd* (1976) ATPR ¶40-012 at 17,242, cited with approval in *Re 7-Eleven Stores* [1994] ATPR ¶41-357 at 42,677.

³⁴ *Re 7-Eleven Stores* [1994] ATPR ¶41-357 at 42,683

³⁵ *Qantas Airways Ltd* [2004] ACompT 9 at [156], quoted in *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,518 [109].

C.2 Likely Public Benefits

(a) *Public benefits – Increased consumer protections from requirement that BNPL finance arrangements meet certain standards*

57. CALC contends that, like all consumer credit, BNPL arrangements create a risk of causing financial hardship for consumers. BNPL arrangements are not subject to the obligations under the NCCPA and NCC, which are intended to mitigate that risk.³⁶
58. ASIC contends that it remains concerned that the current regulation of BNPL is not equivalent to the regulation of credit under the NCCPA and NCC, including because it does not involve regulatory requirements governing responsible lending, external dispute resolution, hardship, disclosure and licensing of providers.³⁷
59. The ACCC considers that a public benefit arises from mitigating the risk of consumers entering into unsuitable or unaffordable deferred payment arrangements. The consumer protections in the Consumer Code that permit signatories to offer BNPL finance only where the BNPL finance provider meets additional requirements beyond those imposed by the general law are likely to generate such benefits.
60. In this regard, the following matters are germane:
- 60.1. NET products are often offered with deferred payment arrangements to consumers. Certain NET products (such as solar panels or batteries) may be very expensive;
- 60.2. the intention of the Consumer Code, among other things, is to raise standards of consumer protection in the relevant sector;³⁸
- 60.3. the Consumer Code imposes restrictions on signatories offering deferred payment arrangements to consumers in relation to the sale of NET products where these deferred payment arrangements, including BNPL finance, do not meet certain requirements;
- 60.4. the requirements for BNPL providers under the Consumer Code go beyond what is required by BNPL providers to lawfully supply BNPL finance arrangements.
61. The Australian Finance Industry Association Limited has released for comment a draft industry code of conduct applicable to BNPL providers (the **BNPL Industry Code**). This code is not finalised and is not in force.³⁹ It is not known what final form it will take. There will be a period of time (of uncertain length)⁴⁰ before any code comes into force, during which time BNPL providers would not be allowed to offer finance under the Consumer Code, unless an interim regime is in place. In addition, the exact form of the BNPL Industry Code

³⁶ CALC SOFIC at [14].

³⁷ ASIC SOFIC at [18(e)].

³⁸ Consumer Code at pg 2. See also Authorisation Applicants' SOFIC at [12].

³⁹ Flexigroup ASOFIC at [37]-[41].

⁴⁰ Flexigroup has stated that the BNPL Industry Code is proposed to become operational by 1 July 2020, but it may not meet that target.

is not known, including the extent of consumer protections it will mandate.⁴¹ Due to these and other⁴² uncertainties, the ACCC considers that any BNPL Industry Code does not reduce to nil any public benefit associated with increased consumer protections under the Consumer Code.

(b) Public benefits – Increased consumer protections relating to unsolicited sales

62. There is a risk that consumers will enter into unsuitable or unaffordable finance arrangements as a result of unsolicited sales of NET products. That risk may be higher in relation to BNPL finance than for regulated credit products provided by licensed credit providers.⁴³
63. CALC contends that, since at least 2007, misleading or high-pressure unsolicited sales have been a notable problem in the retail energy sector, including among solar retailers.⁴⁴
64. The ACCC considers that a restriction on NET retailers making unsolicited offers of BNPL finance may reduce the risk of consumers entering into unsuitable or unaffordable finance arrangements in the course of unsolicited sales of NET products.
65. It is unclear whether, as contended by the Authorisation Applicants,⁴⁵ prohibiting the unsolicited offers of BNPL finance will also have the practical effect of levelling the playing field with providers of NCC and NCCPA-regulated forms of finance which largely do not offer finance through retailers engaging in unsolicited sales, due to the legal requirement for the retailer to hold an Australian Credit Licence to offer regulated credit products in unsolicited sales.
66. Clause 3(d) of the Consumer Code states that signatory retailers will make no unsolicited offers of payment arrangements not regulated by the NCCPA *in their advertisements and promotional material*. While this goes beyond what is currently legally required in relation to BNPL finance, the intention of clause 3(d) (as understood by the ACCC) was to restrict NET retailers from offering BNPL finance in connection with unsolicited sales of NET products and to introduce competitive neutrality with respect to the supply of finance arrangements in order to achieve increased consumer protections. If that is so, the Clarification on Unsolicited Offers Condition may be regarded as necessary and appropriate because it is unclear whether merely prohibiting unsolicited offers of BNPL finance in advertisements and promotional material alone will achieve consumer protection goals adequately.

(c) Public benefits – Other increased consumer protections from signatory retailers

67. The ACCC considers that additional consumer protections afforded by the Consumer Code, in the form of provisions that impose obligations beyond those currently legally imposed, are likely to give rise to a public benefit. These protections include:

⁴¹ See ASIC SOFIC at [12].

⁴² See ASIC SOFIC at [12].

⁴³ See CALC SOFIC at [18(a)-(b)]. [See also](#)

⁴⁴ CALC SOFIC at [4716]-[18].

⁴⁵ See Authorisation Applicants' SOFIC at [43]-[44]. See also Ratesetter SOFIC at [15(d)].

- 67.1. taking extra care if a signatory becomes aware that a consumer may be facing vulnerable circumstances (clause 6);
- 67.2. providing site-specific installation plans and performance estimates (clause 17);
- 67.3. making 'fit for purpose' inquiries (clauses 7-8);
- 67.4. improving complaints handling processes (clauses 53-54).

(d) Public benefits – Reduced information asymmetry from key commitments in Consumer Code

- 68. The Consumer Code contains provisions directed at reducing information asymmetry between signatories and consumers. The Consumer Code imposes obligations on signatory retailers in relation to disclosure, advertising and communicating to consumers their rights beyond what is required by the general law.
- 69. The ACCC considers that reducing information asymmetry is likely to give rise to a public benefit. The relative complexity of NET products means that consumers require more information to be provided to them in order fully to understand their purchase.⁴⁶

C.3 Likely Public Detriments

(a) Public detriments – Reduced consumer choice of finance arrangements available under the Consumer Code

- 70. Clause 25 of the Consumer Code states that, for a signatory retailer to offer BNPL finance, the BNPL finance provider must, among other things, hold, or be a related body corporate of a credit provider that holds, an Australian Credit Licence.
- 71. BNPL providers are not required by law to hold an Australian Credit Licence. Some BNPL providers, or their related bodies corporate, do so. Those that do so offer traditional credit products for which an Australian Credit Licence is required in addition to their BNPL products. Flexigroup falls within this class.
- 72. Other BNPL providers do not currently hold, and would not be able to obtain, an Australian Credit Licence because they do not offer NCC/NCCPA regulated credit products. This may result in a loss of consumer choice to the extent that BNPL providers decide that it is not commercially viable to, or they are not able to, offer the higher standards.

(b) Public detriment – Lessening of competition in the supply of financial products, particularly deferred payment arrangements, in relation to the offer of NET products and services

- 73. NET products can be very expensive (e.g., solar panels). NET products are often offered to consumers with deferred payment arrangements. The Consumer Code imposes requirements on signatories in relation to the offer of deferred payment arrangements, including BNPL finance.

⁴⁶ See CALC SOFIC at [12], [18a]; Authorisation Applicants' SOFIC at [37]-[39].

74. These additional requirements may prevent consumers from accessing certain deferred payment arrangements as a result. Consumer choice may thus be limited. This may in turn reduce competition in the market for the supply of finance products in relation to NET product and services.

75. Ratesetter contends⁴⁷ that there is unlikely to be a lessening of competition in the supply of finance for NET products.

(c) *Public detriment – Lessening of competition in the supply of NET products and services*

76. Signatories to the Consumer Code may be competitors in the supply and installation of certain NET products. The Consumer Code is a voluntary code. However, Flexigroup has contended that suppliers and installers are very likely to become signatories, because of the way government rebate schemes and tender requirements operate (for example some state government rebate schemes only offer rebates to consumers for installations performed by signatories to a relevant code).⁴⁸

77. There is likely to be a lessening of competition in allowing signatories, who may be competitors, to agree to adopt consistent business practices rather than competing on their offerings to consumers.

78. In circumstances where government rebate schemes are linked to whether a NET retailer is a signatory of the Consumer Code, public detriment could also arise from signatories being inappropriately expelled or suspended, or applicants being denied membership.

D. THE BALANCE OF BENEFITS AND DETRIMENTS

79. The Tribunal should weigh the public benefits and public detriments and determine whether the net public benefits test is satisfied in respect of the Proposed Conduct.⁴⁹

80. The ACCC considers that the Proposed Conduct would be likely, in all the circumstances, to result in a benefit to the public, and the benefit to the public would outweigh the detriment to the public resulting from the Proposed Conduct such that the test in s 90(7)(b) is met. In this regard, the following should be noted.

80.1. the Consumer Code is directed at improving consumer protections for consumers buying NET products and services by setting higher standards of consumer protection for NET retailers. Such standards extend to limiting the offer and form of finance that signatories can offer consumers in certain circumstances. Potential loss of consumer choice and potential anti-competitive detriment should be balanced against the benefits of higher consumer protections and reduced consumer detriment deriving from requirements which in effect are aimed at ensuring that more stringent checks are carried out upfront before finance is arranged, and preventing the unsolicited offering of BNPL finance;

⁴⁷ Ratesetter SOFIC at [17(a)-(d)].

⁴⁸ Flexigroup ASOFIC at [11].

⁴⁹ See paragraph [2243] above.

- 80.2. there is a balance to be struck between achieving higher standards of consumer protection for all types of finance offered by signatory retailers under the Consumer Code, including BNPL finance, without imposing unduly burdensome obligations that would lead to a restriction on consumer choice;
- 80.3. any detriment arising from a loss of competition should be balanced against the benefit to consumers from the adoption of improved business practices by signatories;
- 80.4. the mechanisms and procedures provided for in the Consumer Code's governance framework are likely to mitigate any risk of signatories being inappropriately suspended or expelled from, or denied membership under, the Consumer Code, without being afforded an opportunity to appeal or without sufficient cause.

E. THE TRIBUNAL'S POWER TO IMPOSE CONDITIONS

E.1 Applicable Principles

81. ~~Section 91(3) provides that an authorisation may be expressed to be subject to such conditions as are specified in the authorisation.~~ Section 88(3) provides that the Tribunal may specify conditions in the authorisation and if any of the conditions are not complied with, the statutory protection from legal action for engaging in the conduct specified in the authorisation does not apply.
82. On the basis of the SOFICs filed, the Tribunal's power to impose conditions on an authorisation does not appear to be contentious.⁵⁰ What is contentious is the content of any conditions that should be imposed, and when the Tribunal ought to consider imposing conditions.
83. While there is no express limit upon the kind of conditions that may be imposed ~~under s 91(3)~~, the Tribunal's power to impose conditions is not unlimited. That power is constrained by the subject matter, scope and purpose of the CCA.⁵¹ The Tribunal may impose a condition in circumstances where, although the net public benefit test is met without the condition, the Tribunal would not be prepared to exercise its discretion in favour of authorisation.⁵²
84. Furthermore, the Tribunal's power to impose conditions is not limited to circumstances where the statutory test is not satisfied.⁵³ That is, even though the Tribunal considers that the net public benefit test in s 90(7)(b) is satisfied, it can still go on to impose conditions. Ratesetter submits that no condition should be imposed merely because the net benefit test is satisfied,⁵⁴ but this approaches the power to impose conditions too narrowly.
85. In *Application by Medicines Australia Inc*, the Tribunal outlined that a condition may be imposed in various circumstances including:

⁵⁰ See, eg, Applicant's SOFIC at [60]; Authorisation Applicant's SOFIC at [51]; CALC's SOFIC at [37], [42].

⁵¹ [Application by Medicines Australia Inc \[2007\] ATPR ¶42-164 aAt 47,523](#) [129].

⁵² [Application by Medicines Australia Inc \[2007\] ATPR ¶42-164 at 47,522-47,524](#) [128], [133].

⁵³ Cf the Authorisation Applicants' SOFIC at [48]-[49].

⁵⁴ Ratesetter SOFIC at [18].

- 85.1. where there is no, or insufficient, public benefit, such that the conduct does not satisfy the test for authorisation, a condition may be imposed requiring a variation of the proposal which would yield the requisite public benefit. Such a condition may:
- 85.1.1. reduce the public detriment for the purposes of s 90(7)(b);
 - 85.1.2. reduce the public detriment which would otherwise cause the claimed public benefit to be discounted;
 - 85.1.3. increase the public benefit such that it would meet applicable statutory test;
- 85.2. where a theoretically sufficient public benefit has been identified, a condition may be imposed to vary the proposal so that the likelihood of the benefit resulting is raised to a sufficient level;
- 85.3. where the public benefit test in s 90 is satisfied, a condition may be imposed, without which the Tribunal would not be prepared to exercise its discretion in favour of authorisation. In this regard, the range of conditions that may be imposed is limited by the range of considerations relevant to the exercise of the discretion.⁵⁵
86. It is appropriate for the Tribunal to have regard to the burden the condition would impose upon the party seeking authorisation.⁵⁶

E.2 The ACCC's Contentions

(a) *When conditions can be considered*

87. If the net public benefits test is not satisfied, it would be appropriate for the Tribunal to consider whether any condition it could impose would yield the requisite public benefit or increase the likelihood of the public benefit being realised, such as to satisfy the test.
88. If the public benefit test is satisfied, the Tribunal should nonetheless consider whether there are condition(s) without which the Tribunal would not be prepared to exercise its discretion in favour of authorisation.
89. The Tribunal is permitted to consider the conditions imposed by the ACCC in its determination, and the alternative conditions put forward by the parties.

(b) *BNPL finance requirements*

90. The Tribunal may consider that one or more conditions are necessary to reduce the likelihood of public detriments from a loss of consumer choice or the lessening of competition under the Consumer Code, and to ensure the consumer protection benefits of the Consumer Code are more likely to be realised.
91. The Tribunal may wish to impose a condition similar to the BNPL Finance Requirement Condition. That condition removes some of the barriers to BNPL providers being able to

⁵⁵ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,523-47,524 [133].

⁵⁶ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,523-47,524 [133].

comply with these higher consumer protection standards. It makes it more likely that a BNPL provider can meet the standards required for its BNPL finance product to be offered under the Consumer Code. In turn, more BNPL providers are likely to seek to make their financial products available under the Consumer Code and to adhere to a higher standard of consumer protection in the offer of that financial product. Accordingly, consumer protection benefits are more likely to be realised with the BNPL Finance Requirement Condition.

92. The Tribunal may wish to consider the alternative conditions of authorisation proposed by Flexigroup and the Authorisation Applicants to reduce the consumer detriment associated with a loss of consumer choice of finance arrangements under the Consumer Code.
93. However, the Tribunal may consider it is unclear whether these alternative conditions of authorisation are likely to achieve a sufficient level of consumer protections for consumers using BNPL finance arrangements to purchase NET products. So too, the Tribunal may consider that the BNPL Industry Code is unlikely to be operational by 1 July 2020 and that at least transitional provisions should be included in the Consumer Code pending its finalisation.

(c) *Unsolicited sales*

94. The Tribunal may wish to consider a condition similar to the Clarification on Unsolicited Offers Condition (clause 3(d)) to clarify the scope of the clause and/or increase consumer protections with regard to the offering of BNPL finance in unsolicited sales of NET products.
95. The Tribunal may wish to consider the alternative conditions of authorisation proposed by Flexigroup, such as whether to remove clause 3(d) of the Consumer Code. Flexigroup's application for review [and ASOFIC seeks](#) to have the Tribunal remove clause 3(d) in its entirety as a *condition* of authorisation.

(d) *Reporting*

96. The Tribunal may wish to impose a condition similar to the Reporting Condition, to allow for monitoring of the success of the Consumer Code in providing public benefits.
97. No party has sought that this condition to the ACCC's determination be varied.

F. THE PERIOD OF AUTHORISATION

98. Section 91(1) provides that an authorisation may be expressed to be in force for a specified period. The ACCC granted authorisation for 5 years.
99. Flexigroup, the Authorisation Applicants and the interveners do not raise any concerns about the length of authorisation proposed by the ACCC.

Ruth C A Higgins SC

Christopher Tran

[27 March 2020](#) [17 April 2020](#)

Attachment A

Attachment B – New Energy Tech Consumer Code

Part A - Overview

Scope

This New Energy Tech Consumer Code (“the Code”) sets good practice standards for providing Residential and Small Business Customers with New Energy Tech products, systems and services. We may extend these protections to other customers if we expressly include this in the contract. New Energy Tech is defined in Part C of the Code to include such things as solar photovoltaic systems, wind turbines, energy storage systems, managing a customer’s energy usage and electric vehicle charging services but does not include some simple, low cost, standard New Energy Tech.

The intention of this Code is to raise standards of consumer protection in the sector, to strengthen consumer confidence in New Energy Tech and to encourage innovation and the development of choice for consumers.

Providers who have been accepted by the Administrator as Code Signatories (referred to as “we” and “our”) are bound to comply with this Code. Customers protected by this Code are referred to as “you” and “your”.

The Code includes:

- Part A that provides an overview of the key commitments we make to you
- Part B that sets out our required practices in detail
- Part C that defines key terms (which are Capitalised in the Code) and
- an Annexure setting out how the Code is administered, monitored and enforced, including our obligations to the Administrator and the Code Monitoring and Compliance Panel (“The Panel”).

The Code operates alongside a range of existing legal and regulatory protections. Generally, it does not repeat these protections except as needed to provide you with a complete understanding of what to expect from us.

Key Commitments

1. The key commitments made under this Code are to:
 - a) Provide you with clear, accurate and relevant information to help you make informed choices
 - b) Encourage you to be aware of your rights under the law and the Code
 - c) Ensure that our sales practices are responsible
 - d) Ensure that products, systems, services and documentation provided under the Code are suitable and fit for purpose
 - e) Support staff training and work processes that ensure that we comply with the law and the Code
 - f) Ensure that we will be responsive to your needs and take prompt, appropriate action if you make a complaint.

The Code aims to cover the main steps of your 'customer journey' as illustrated below.



Advertising & Promotion

We will be honest, accurate, clear and fair.



Direct marketing & sales

We will identify ourselves, provide unbiased information and use no pressure-selling. We will take extra care throughout if we become aware that you may be vulnerable.



Fit for purpose

Our aim is to ensure that our offers are fit for purpose. Where we are to configure or install on your site, we will ask about your needs and ensure that our offer is fit for that purpose.



Quoting

Our quotes will provide comprehensive details of our offer, including expected performance and any limitations, an itemized list of inclusions, installation times, a breakdown of costs, any relevant warnings and your rights and obligations.

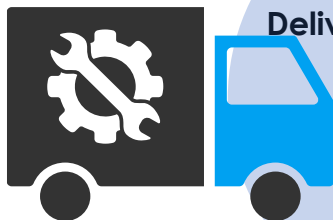


Contracts

If you agree to go ahead with an offer involving a contract, our written contract will address all aspects of the quote, including any variance from the original quote, applicable warranties and any issues that you should particularly note.

Payment & Finance

We will provide clear and complete information about your payment options. We will only offer finance through others if they are a licensed credit provider.



Delivery, installation & safety

We will deliver and install in the timeframe promised and in accordance with all safety regulations, manufacturers' specifications and Australian Standards.



Activation

We will assist you with any necessary activation steps to begin delivering your benefits, including with any necessary approvals and connection to an energy network.



User information

We will provide you with information for safe, effective and optimum use of your service or purchase including any of your obligations.



Customer service

We will have fair terms and maintain high standards of communication and support. We will ensure that we respond courteously and act promptly to any contact or reasonable requests from you.

Warranty

We will honour all guarantees and warranties you may be entitled to and we will promptly fix service issues, and make repairs or replacements.



Complaints

We will respond promptly and fairly if you have a complaint with our service or your purchase. We will keep you informed as to progress and if you are not satisfied with our response, refer you to independent complaints bodies.



Compliance

We will comply with this Code and with all relevant laws, regulations and standards including Privacy laws.



LAW



REGULATIONS



STANDARDS

Part B – Our required practices

Advertising and promotion

2. We will ensure that we have adequate systems, policies and processes in place to ensure fair marketing and appropriate sales outcomes for consumers.
3. Our advertisements and other promotional material will not include any false or misleading claims about us or our New Energy Tech. In particular, our advertisements and promotional material will:
 - a) ensure all relevant incentive schemes (government and non-government) are honestly and accurately represented
 - b) not misrepresent our association with government or falsely claim to be part of a government scheme
 - c) not make any false or misleading claims about the price, value, quality, capacity, output or other performance characteristic of our New Energy Tech, for example, through selective advertising, exaggeration or misleading focus on one or a few aspects only of the New Energy Tech
 - d) make no unsolicited offers of payment arrangements not regulated by the *National Consumer Credit Protection Act (2009) (Cth)* (“NCCPA”)
 - e) use language that is accessible and that avoids industry jargon
 - f) not make any misleading claims about the place of origin (manufacture and assembly) of our products
 - g) not mislead you about the impact our New Energy Tech will have on your energy usage or costs
 - h) ensure that any claims relating to performance and energy cost savings of our New Energy Tech are reasonably based and where available, based on reputable sources
 - i) advertise the total price for our New Energy Tech as prominently as we advertise any component of the price
 - j) provide information that is specific to the state or region in which the promotional activity takes place
 - k) ensure that any disclaimers are clearly outlined and not buried in small print
 - l) only include a statement, promise, prediction or opinion if it is reasonably based
 - m) not include information that is no longer current, for example, quote an offer or financial incentive that is no longer available
 - n) be clear about any additional cost for finance or an alternative purchasing arrangement for New Energy Tech when the cost is being recovered in the overall price (e.g. where the price of financed New Energy Tech is greater than the price that would apply if immediate payment is made).



Direct marketing and sales

4. When marketing directly to you, including through a sales agent (as well as meeting the requirements in paragraph 3):
 - a) we will explain up-front the purpose of any un-requested (“unsolicited”) contact by us, in person or by telephone and advise that you can ask us to leave or end the contact at any time
 - b) we will leave your premises or end the contact immediately if you ask us to do so
 - c) we will show you our company-issued identification if an unsolicited contact is in person
 - d) any interactive internet marketing channel that we use will clearly identify for you the company whose New Energy Tech is being promoted
 - e) we will provide you with the address of our local office or showroom, an email or other electronic address and a telephone number where any queries can be answered
 - f) we will provide you with the Administrator approved Consumer Information Product that explains the consumer protection framework that applies under legislation and this Code and sets out other key information. The information may be provided to you in electronic format, however if you request, we will provide you the information in hard copy.
5. We will adhere to responsible marketing practices at all times and avoid high-pressure sales tactics that may induce you to make hasty or uninformed decisions about the New Energy Tech you are considering. High-pressure sales tactics include (for example):
 - a) seeking to sell to you if you are unlikely to be able to understand our information and/or our contract (e.g. due to English language difficulties, age, learning difficulties, mental illness or physical disability)
 - b) offering discounts for agreeing to provide testimonials and/or referrals
 - c) claiming special discounts (eg. “community” or bulk-buy discounts) apply, if they don’t
 - d) applying psychological pressure to persuade you to make a quick purchase decision (eg. by unfairly appealing to your emotions)
 - e) employing badgering techniques, such as revisiting your premises uninvited or making frequent telephone calls, to pressure you into signing a contract
 - f) other conduct that the Administrator may reasonably identify as high-pressure sales tactics.
6. Throughout our dealings with you, we will take extra care if we become aware that you may be facing vulnerable circumstances (eg. illness, impairment, a victim of abuse, financial stress).



Fit for purpose inquiry

7. As appropriate to the nature, complexity and cost of the new Energy Tech you are considering, we will support you in making a fit-for-purpose choice including:
- ask you about your specific circumstances, needs and expectations. This includes the extent to which you plan to use our New Energy Tech to supplement or improve the efficiency of energy use while connected to an Energy Network or be isolated from the Energy Network (also known as “off-grid”) or your expected outcomes from participating in forms of New Energy Tech supply such as virtual power plants or other energy markets.
 - enquiring about any need you may have for energy for medical or life-support equipment or services and ensure that our New Energy Tech is suitable for this purpose and that you are made aware of any additional or increased risks.
 - ensuring that any offer of New Energy Tech is fit for purpose in light of your circumstances, needs and expectations as you have described them to us (unless we clearly explain to you orally and in writing that it is not fit for that purpose). We will include a brief description of your circumstances, needs and expectations in our quotes and contracts. Where we offer you a New Energy Tech that is intended to work in conjunction with other New Energy Tech that you already have or are obtaining, we will ensure that our offer is compatible with that other New Energy Tech and confirm this in writing in your quote and contract.
8. If you advise us that you are considering operating off the Energy Network, we will provide you with a copy of the Administrator-approved Consumer Information Product that sets out Energy Networks Australia’s Off-Grid Principles.



Quote – general requirements

9. We will provide you with a written quote that sets out:
- our full name, Australian Business Number (if relevant) and physical address, an email or other electronic address and a telephone number where any queries can be answered
 - an itemised list of the New Energy Tech to be supplied, including relevant specifications. For products and systems, this will include the manufacturer, model, year, quantities, configuration and performance specifications. For services, this will include the nature and purpose of the services, whether the services are ongoing, scheduled (and if so what frequency) or responsive to your request, the duration of the service commitment and whether the services will be provided remotely or at your premises
 - information about how the New Energy Tech operates
 - information about any responsibilities you have to facilitate the operation of the New Energy Tech including maintenance and access issues
 - information about product, system or service limitations that are likely to be relevant to you (eg. where a battery does not provide a back-up facility)



- f) a performance estimate for the New Energy Tech to be supplied, which will be reasonably based, where available rely on reputable sources and comply with any relevant Administrator guidance
- g) where our offer is for a New Energy Tech product or system to be connected to the Energy Network, information that your energy supply contract may change as a consequence of purchasing the New Energy Tech and that it is your responsibility to contact your Energy Supplier to find out about this and whether there are any restrictions to your ability to interact with the Energy Network
- h) our timeframe for supplying and installing products and systems or commencing services to be provided to you (if there are circumstances that are out of our control that may cause delay, we will identify this)
- i) our business terms including the method of making payments
- j) details of any guarantees and warranties that apply. We will specify:
 - i. that your rights under your contractual warranty are in addition to the consumer guarantees under the Australian Consumer Law and that these are not excluded or replaced by your contract
 - ii. the specific details of the guarantee or warranty and how it applies to you
 - iii. for a New Energy Tech product or system - the name and contact details of our supplier in case you want to pursue your consumer guarantee rights under the Australian Consumer Law against that supplier or if for any reason you are unable to contact us.
- k) for a New Energy Tech product or system, information about its expected life and what is involved in disposing of it at the end of its life
- l) information about the portability of the proposed New Energy Tech
- m) information about the term of any applicable ongoing agreement and any provisions that may impact on your existing relationship with an Energy Supplier
- n) if the quote is for an installation on a strata title property and requires the approval of the Owners Corporation – the need for you to obtain that written approval and provide it to us before you sign the contract with us
- o) your cooling-off and termination rights (if applicable) under the Australian Consumer Law (including the right to terminate a sales agreement within 10 business days if the sale resulted from an unsolicited contact) and this Code
- p) any licenses, accreditation or certification that we hold that are needed to fulfil the offer we are making to you
- q) that we are bound by this Code
- r) the Administrator-approved Consumer Information Product that explains the benefits of the Code for our Customers and any other important information as applicable.

Quote – financial disclosure

10. Our quote to you will specify the deposit payable (if any) and the total price of all offered New Energy Tech including any taxes that apply. We will specify the period of time our pricing is valid for (which will be at least 10 business days).
11. Where our offer is of a Power Purchase Agreement, our quote will specify:
 - a) the energy pricing and all associated fees and charges, any rights we have to change any of these and the notice we will provide of any price change
 - b) a reasonable estimate of the aggregate amount payable over the agreement's term based on a stated, reasonable estimate of your energy consumption, including the basis of the calculation and, if applicable, the energy you will export to the Energy Network
 - c) a clear statement that you must pay the stated energy prices for the term of the contract and that this amount may not reflect or be competitive with available prices for energy from the Energy Network.
12. Our quote to you will specify site conditions and circumstances beyond our control that may result in extra chargeable work not covered by the quote (eg. fees for meter exchange/re-configuration, repairs to existing faults, and changing dedicated off-peak control devices if required).
13. Our quote to you will specify the total value of any discounts, regulatory certificates, incentives or rebates (government and non-government) or government relief schemes and how and when these may or may not apply.
14. Where we offer New Energy Tech services and periodic or intermittent charges apply, our quote will specify the amount or method of calculation, any rights we have to vary charges during the term of the contract and the frequency of bills. For example, if there will be charges for software upgrades, we will aim to provide reasonable certainty as to the cost that you will incur.
15. If we make a claim that you are likely to achieve a favourable return on your investment, we will include in our quote a return on investment calculation that is based on reasonable assumptions and where available from reputable sources. Our quote will set out our assumptions including:
 - a) system design, performance and output
 - b) government and non-government financial incentives
 - c) energy prices and usage
 - d) financing costs (if applicable)
 - e) maintenance costs
 - f) end-of-life costs
 - g) any other relevant factors.

We will also clearly state that our calculation is an estimate only and that if our assumptions prove not to be correct you may not achieve the estimated return.
16. If our offer involves us making payments to you (for example, for energy purchased from you), we will clearly specify how payments will be determined, any rights that we have to change the basis on which payments will be calculated and the frequency with which payments will be made.

Quote – design

17. If the quote includes New Energy Tech that requires custom configuration or specification and/or physical installation by us or a competent or qualified installer:
- a) we will include as part of the quote:
 - i. a site-specific installation design or plan (a sketch or diagram is acceptable) including any configuration or positioning issues and how the New Energy Tech will integrate with other New Energy Tech you may have
 - ii. a site-specific performance estimate for the New Energy Tech.
 - b) before we enter into a contract to provide New Energy Tech to you, we will complete a site-specific installation design or plan and site-specific performance estimate (both must meet the requirements of paragraph 17a)) for a non-refundable agreed fee, with no obligation on you to proceed to contract with us
 - c) we can provide a site-specific installation design or plan and site-specific performance estimate (both of which will meet the requirements of paragraph 17a)) as an initial deliverable of the contract if:
 - i. we do so before the expiry of your cooling-off period (if applicable)
 - ii. we provide you with a full refund, if within 10 business days of receiving the site-specific installation design or plan and performance estimate you notify us that you do not accept these.

Quote - connections

18. If our quote is for a New Energy Tech that requires approval from your Energy Supplier for connection to the Energy Network and/ or reconfiguration of your meter, we will also include in our quote:
- a) an offer to arrange this on your behalf and what, if any, charge we will make for doing this
 - b) an explanation of the steps that need to be taken to obtain approval and/ or reconfiguration of your meter and the relevant paperwork that must be completed and submitted prior to installation
 - c) a statement that your Energy Supplier may impose a charge for connection to the Energy Network and/or reconfiguring your meter and may change your existing energy pricing
 - d) a statement that we will support you through these steps if you decide to obtain Energy Network connection approval yourself and whether there will be any non-refundable charge for this assistance.

Contracts

19. If you accept our quote and agree to purchase our New Energy Tech, we will provide you with a written contract that is clear, uses plain language and is in legible print.
20. Your contract will meet the same requirements as for a quote (and may do this by attaching the quote with any amendments that are necessary). In addition:
 - a) your contract will include our undertaking to you to comply with the Code
 - b) your contract will provide you with a standard minimum supplier's warranty period on the operation and performance of the New Energy Tech including workmanship. The period will meet or exceed the period set from time to time by the Administrator, in consultation with stakeholders, for the particular New Energy Tech
 - c) your contract will include information about how to make a complaint and the complaint resolution process including your right to access an external dispute resolution scheme (where applicable), to take a complaint to the Administrator and to take a complaint to a government regulator and
 - d) at the time we provide your contract to you, we will also provide you with any relevant Administrator-approved Consumer Information Product. We may give these to you electronically, but if requested, we will provide them in hard copy.
21. We will not offer you a contract that involves requiring you to purchase energy or services from another supplier (called "third line forcing"), except where this is permitted by the *Competition and Consumer Act 2010 (Cth)* and we have made this clear to you.
22. We will explain the contract to you prior to you entering into the agreement. In particular:
 - a) we will draw your attention to any particular requirements of the contract that may cause confusion or disagreement (e.g. where additional fees may arise, early termination fees, end of contract payments or any difference between a verbal quote and the final price)
 - b) we will clearly explain the process for the payment and trade of any government or regulatory certificates, and of any relevant trading facility and any limitations
 - c) we will advise you that your Energy Supply contract may change as a result of purchasing the New Energy Tech and that it is your responsibility to contact your Energy Supplier to check what new pricing may be applied and, after installation of the New Energy Tech, to confirm that the agreed pricing has been applied.
23. Both of us will sign the contract and any amendments. Equivalent methods of legal agreement other than physically signing a written contract in person are also permitted (for example, electronic acceptance).



Payment and finance

24. We will issue you with a receipt for any deposit or other payment you make under the contract.
25. We may offer you New Energy Tech with a deferred payment arrangement as an alternative to upfront payment upon delivery or installation. If you are a Residential Customer and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 3.n., we will ensure that:



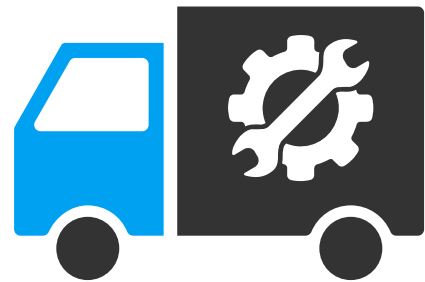
- a) this deferred payment arrangement is offered through a credit provider (whether ourselves or a third party) that is:
- i. licenced under the NCCPA and the deferred payment arrangement is regulated by the NCCPA and the National Consumer Code (“NCC”), or
 - ii. licensed under the NCCPA or is a related body corporate (as defined in section 5 of the NCCPA) of a credit provider licensed under the NCCPA and the deferred payment arrangement is exempt from the NCC, and:
 - (A) the Administrator has determined that the credit provider is a signatory to an industry code of conduct that requires the credit provider to:
 - (I) resolve any complaints you may have using an internal dispute resolution process and if the complaint remains unresolved, an external dispute resolution process (which must include the scheme operated by the Australian Financial Complaints Authority)
 - (II) have processes to identify whether you are experiencing payment difficulties due to hardship
 - (III) offer you alternative and flexible payment options if you are experiencing payment difficulties so that you can meet your repayments
 - (IV) comply with the following sections of the NCCPA as if the credit provider was a licensee and the credit contract was regulated by the NCCPA and the NCC:
 - s 128 (obligation to assess unsuitability)
 - s 129 (assessment of unsuitability)
 - s 130 (reasonable inquiries about the consumer)
 - s 131 (when the credit contract must be assessed as unsuitable)
 - s 132 (giving the consumer the assessment) and
 - s 133 (prohibition on entering, or increasing the credit limit of, unsuitable credit contracts), or
 - (B) the Administrator has approved the credit provider’s deferred payment contract in accordance with paragraph A7 of the Annexure – Code Administration. (This

paragraph (B) is as an interim measure pending the development of an approved code of conduct that will enable paragraph (A) to apply. Paragraph (B) ceases to apply on 1 January 2021 regardless of whether a regulator approved code of conduct is in operation by that date)

- b) the term of the deferred payment contract or lease is no longer than the expected life of the product or system
 - c) you receive the following clear and accurate information:
 - i. the name of the licensed credit provider to whom you will be contracted for the arrangement
 - ii. a clear statement that the deferred payment arrangement is a voluntary finance option
 - iii. the proposed total cost under the deferred payment arrangement compared with the cost of that same New Energy Tech product, system or service if you were to purchase it outright on that day
 - iv. the disclosures required under the NCC, including in relation to fees and charges (regardless of whether the arrangement is regulated under the NCC)
 - v. whether at the conclusion of the deferred payment arrangement
 - you own any elements of the New Energy Tech or
 - you have any entitlement to any ongoing services or pricing and/or
 - you have the option to purchase any elements of the new Energy Tech and if so relevant details, including any associated costs, and
 - vi. a statement that questions and complaints about the payment arrangement should be directed to the licensed credit provider with whom you will be contracted.
26. Paragraph 25 does not apply if the finance is provided by a government body.
27. Paragraph 25 does not apply if we offer you, as an alternative to full payment on delivery or installation, the opportunity to make progressive instalments to us over a period of not more than 6 months, provided that the total amount to be paid by you does not include an interest component, additional fees or an increased price (see paragraph 3. n.).
28. Paragraph 25 does not apply if the Administrator is satisfied that the contract we offer you is a Power Purchase Agreement and our contract includes a commitment to try and assist you if you notify us that you are experiencing financial hardship, including by advising you of any relevant government assistance schemes and by offering you a payment plan.
29. Where we are providing an ongoing service to you and the contract allows us to change the price that we charge you, we will advise you as soon as practical and no later than five business days prior to the price change taking effect.
30. If your contract requires us to make payments to you (whether by transfer of money or by offset to a payment you make to us), we will make those payments on time in accordance with your contract. If our payments to you are calculated using an undisclosed formula, we will ensure that our payment calculation system is regularly audited by a registered company auditor to ensure that payments are accurately calculated.

Delivery, installation and safety

31. We will arrange delivery and installation (if applicable) of New Energy Tech you purchase from us within the timeframe specified in your contract, unless any delay is because of circumstances that were identified in your contract as outside our control.
32. If you purchase New Energy Tech that requires physical installation by us, we will ensure your safety and the safety of our installers. We will install in accordance with all applicable safety standards, manufacturer's specifications, relevant Australian Standards, Energy Network standards, any binding guidance issued by the Code Administrator and good industry practice, using an installer that is trained, competent and where applicable, holds any required qualification or certification to undertake the work.



Activation

33. If you authorise us to obtain Energy Network connection approval on your behalf for New Energy Tech, we will:
 - a) not install or commence the New Energy Tech until approval is provided
 - b) provide you with a full refund if the relevant approvals are not obtained
 - c) prepare and submit within a reasonable timeframe all relevant documentation required by the Energy Supplier for connection to the Energy Network and for reconfiguration of your meter (if relevant)
 - d) respond within a reasonable timeframe to any additional compliance requests from the Energy Supplier (for example, re-submitting incorrect paperwork), and consult with you if necessary
 - e) keep you informed of progress at each step, including any restrictions or limitations that may adversely affect you.
34. If you take responsibility for obtaining Energy Network connection approval for New Energy Tech, we supply to you, we will:
 - a) clearly explain to you each step in the process for preparing and submitting the documentation to the Energy Supplier
 - b) provide you with information as to where to find and how to complete and submit paper or on-line forms
 - c) provide you with expected timeframes and any deadlines for each step of the process
 - d) advise you of contact details for queries or following up on progress
 - e) advise of any potential problems that may arise
 - f) provide you with a refund consistent with paragraph 48 if your application is rejected.



35. If you take responsibility for obtaining Energy Network connection approval for New Energy Tech and your application is rejected after you have signed a contract for that New Energy Tech, we will provide you with a refund minus reasonable expenses incurred by us to the point of termination of the contract.
36. If we supply you with New Energy Tech that needs another form of activation in order to provide you with the intended benefit, we will explain to you the steps that need to be taken and who is responsible for these. We will promptly fulfil our responsibilities and keep you informed of progress at each step.

Operating Information

37. Prior to the activation of the New Energy Tech we are providing you, we will:

- a) provide you with comprehensive information for safe and effective operation, maintenance and optimisation of your New Energy Tech
- b) explain to you any obligations that you may have to facilitate or enable the New Energy Tech (for example, to maintain an internet connection that we are able to access)
- c) advise you how to use your New Energy Tech and/or assess the benefit you are deriving from these. The advice will be appropriate to the New Energy Tech we are providing to you and will involve at least one of the following:
 - i. written instructions and a physical or electronically recorded demonstration (for example, an instructional video)
 - ii. providing you either with a measuring or monitoring device that connects to the New Energy Tech or with continuous access to a remote monitoring service (in either case that will facilitate accurate measurement of benefit that is based on objective standards acceptable to the Administrator) together with written instructions as to how to use that device or access that service
 - iii. a commitment to provide you with regular reports that accurately quantify the benefit that you are deriving and that meet any guidelines made by the Administrator in relation to reporting of this kind (for example, in the case of a service that is designed to reduce your energy bills by smart management of your energy consuming products).



The required information will vary depending on the specifics of the New Energy Tech but will meet the Administrator's requirements. The information may be provided to you in electronic format, hard copy or by web link or something similar. If you request, we will provide you the information in hard copy (in which case, we will provide it at least quarterly, namely every three months).

Performance

38. Our New Energy Tech will meet your reasonable expectations including but not limited to:
 - a) meeting your needs as explained to us (see paragraph 7), unless we have clearly explained to you and confirmed in writing that those needs cannot be met
 - b) performing properly
 - c) reflecting any agreed contract and meeting the performance specifications outlined by us to you;

- d) fulfilling any commitments we make to you (for example, to provide access to an accurate monitoring service or regular reports that accurately quantify the benefit you are gaining)
 - e) New Energy Tech that utilises information and communications technology will be secure
 - f) all our services will be provided with due care and skill.
39. If we become aware that New Energy Tech that we have supplied to you is defective or unsafe, we will promptly tell you and offer to fix the problem if this is possible or otherwise remove the product or system from your premises and provide reasonable compensation to you.
40. If we provide you with New Energy Tech that involves the use of equipment that you own, we will do so in a way that is consistent with the equipment manufacturer's instructions and warranty requirements.

Move from premises

41. If our contract with you includes a lock-in period and imposes fees if you terminate early, and
- a) the services are not transferrable to another property
 - b) you sell or move from the property to which those services are being provided
 - c) the occupier of the property agrees to take over your contract

we will agree to the occupier of the property substituting for you under the contract and will not charge you early termination fees, unless we have a reasonable basis for refusing to contract with the occupier of your property.

Warranty claim

42. We will respond promptly to any warranty claim by you and within a reasonable timeframe implement warranty repairs and replacements, remedy service issues or provide compensation.
43. We will provide you with the name and contact details of our New Energy Tech product or system supplier in case you want to pursue your consumer guarantee rights under the Australian Consumer Law against that supplier or if for any reason, you are unable to contact us.
44. In some circumstances, you may not be entitled to a consumer guarantee under Australian Consumer Law, and in that case, you may not be entitled to a remedy, if the claim is due to something that:
- a) someone else said or did (excluding our agents or employees) or
 - b) beyond human control that happened after the goods or services were supplied (for example, an extreme weather event).



Termination of contract

45. You are entitled to terminate your contract and we will provide you with a full refund if:
- a) your contract is for the supply of New Energy Tech that requires physical installation
 - b) consistent with paragraph 17.b), we provide you with a site-specific installation design or plan and site-specific performance estimate as an initial deliverable under the contract (rather than as part of our quote)
 - c) within 10 business days of receiving our site-specific installation design plan and performance estimate you notify us that you do not accept these.
46. You are also entitled to terminate your contract and we will provide you with a full refund, if your contract is for the supply of New Energy Tech that requires physical installation and either of the following applies:
- a) we propose to significantly change the New Energy Tech installation design from that previously provided to you (whether provided in our quote or as a first deliverable under your contract) and you are not willing to accept the change or
 - b) site conditions and circumstances beyond our control result in extra chargeable work not within the contract price and we are not willing to bear those additional costs.
47. You are also entitled to terminate your contract for the supply of New Energy Tech, and we will provide you with a full refund, if we fail to meet the timeframe specified in your contract for delivery and installation (if applicable), or commencement of service of any New Energy Tech. This does not apply, however, if the delay was because of circumstances that were identified in your contract as outside our control.
48. If you take responsibility for obtaining Energy Network connection approvals and your application is rejected after you have signed a contract with us (see para 35), you may terminate the contract and we will provide you with a refund minus reasonable expenses incurred by us up to the time of the termination.
49. We will terminate your contract and remove New Energy Tech that we supplied to you and return the site to its former state, if:
- a) you have a strata title property
 - b) you were required by law to obtain the Owners Corporation written consent before installing our New Energy Tech
 - c) you entered into a contract with us to supply the New Energy Tech before obtaining that written consent and
 - d) the Owners Corporation subsequently refuses to give that consent.
- We will provide a full refund and conduct the removal and restoration at our cost, unless:
- e) we advised you of the need for written consent under paragraph 9.n) and



- f) we have proceeded with the installation on your incorrect advice that yours is not a strata title property.

50. Under the Australian Consumer Law, if the sale to you was unsolicited and you are a Residential Customer, you will be given 10 business days after you sign a contract to cancel the contract without penalty (the “cooling-off period”). If you wish to withdraw from a valid contract after the expiry of any cooling-off period, we may apply our own policies regarding fees for cancellation, provided that we specified them in the initial contract. For all Customers protected by this Code, we may only impose cancellation or termination fees that are reasonable and related to the cost incurred by us.

Customer service

51. We will provide fair terms, clear communication and maintain high standards of customer service at all times and respond courteously and promptly to any contact from you and queries you may have about New Energy Tech supplied by us to you.



52. If we have an ongoing service relationship with you and we are aware that you may be facing vulnerable circumstances (eg. illness, impairment, a victim of abuse, financial stress or needing energy for medical or life-support equipment or services), we will take additional care to respond promptly to any related issues arising from the use of our New Energy Tech.

Complaints

53. If you are dissatisfied with a New Energy Tech we offered or supplied, you can submit a complaint directly to us. A complaint may include, for example, any expression of dissatisfaction with a New Energy Tech offered or provided, with the sales process or salesperson, or with the complaints handling procedure itself.



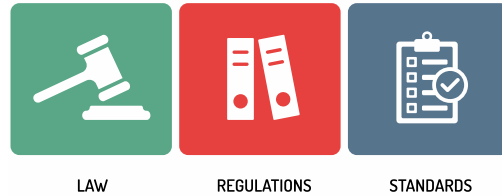
54. We will handle your complaint in a way that is fair, timely and transparent. This means that:

- a) we will have information readily available for you and our staff about how complaints may be made, how these are handled and available avenues to which you can escalate your complaint if you are not satisfied with our response
- b) we will acknowledge receipt of your complaint as soon as possible and tell you when we expect to be able to respond to your complaint
- c) we will log your complaint in a complaint’s register and promptly begin investigating the issues
- d) we will aim to provide you with a response to your complaint within 15 business days of receipt of your complaint. If we do not provide you with a final response by then, we will advise you before 15 business days have passed and provide an update of progress;
- e) we will provide you with a final response to your complaint within 25 business days of receipt of your complaint, unless we have both agreed to a further extension
- f) if you are dissatisfied with our response to your complaint, we will provide you with contact details for escalation options including any external dispute resolution (Ombudsman) scheme of which we are a member, the State Consumer Affairs or Fair Trading body and the Administrator

- g) we will maintain appropriate record keeping of complaints and their outcomes and steps that we take to minimise similar complaints in the future.

Legal and privacy obligations

55. We will comply with all local, state and federal legislation, relevant Accreditation Guidelines, and regulations including but not limited to:



- a) The Renewable Energy (Electricity) Act 2000 (Cth) which is supported by the Renewable Energy (Electricity) Regulations 2001 (Cth)
- b) The Do Not Call Register Act 2006 (Cth) and associated telemarketing standards including permitted hours for contacting consumers
- c) Australian Consumer Law
- d) Respecting “Do Not Knock” and “No Hawkers” stickers.
56. Even if we are not bound by the Privacy Act 1988 (Cth), we will take reasonable steps to ensure the safety of your personal information and we will only use your personal information:
- a) for the purpose of providing you with a requested quote or carrying out our obligations under your contract (as applicable)
- b) for future marketing of other related New Energy Tech or providing you with information that you might reasonable expect to receive from us or
- c) to provide your personal information to a third party if you have given express permission for this.
57. We will not provide you with marketing material unless we also provide a simple, easy way for you to ask not to receive future direct marketing communications and include a clear, prominent opt-out provision in each marketing communication.

Training

58. We will train our sales agents, representatives, contractors and employees about our New Energy Tech and their responsibilities under this Code, so that they can provide you with accurate information and quality services.
59. We will ensure the safety of our installers, subcontractors and employees and demonstrate due diligence in ensuring the safety of persons under our direct or indirect responsibility.
60. Our people will be competent, appropriately qualified and have completed the relevant safety training modules (as specified by the relevant regulator or by the Administrator) appropriate to the work.

Compliance with the Code

61. We agree to comply with this Code as amended from time to time and any mandatory standards published by the Administrator on the Code website that apply to New Energy Tech that we provide. We will also ensure that our employees, contractors, agents, representatives and any other individuals

or businesses acting on our behalf do likewise. This includes third parties we engage to undertake direct marketing and sales for us.

62. We will be responsible for all actions governed by this Code, whether taken by our employees, contractors, agents, representatives or any other individuals or businesses acting on our behalf. This includes third parties we engage to undertake direct marketing for us or who we engage to install products or systems we provide to you or to deliver services to you.

Part C – Definitions

The definitions for terms used in this Code are as follows.

Administrator is the organisation with responsibility for administering the Code as set out in the Annexure – Code Administration.

Australian Consumer Law – Schedule 2 to the Competition and Consumer Act 2010 (Commonwealth).

Business day – A day that is not a Saturday, Sunday or public holiday in the relevant location in Australia.

Customer – A potential or existing Residential Customer or Small Business Customer. The term also includes other customers if their contract expressly includes that this Code applies.

Consumer Information Product – consumer information (hardcopy, web-based, electronic, etc) that is approved by the Administrator to provide independent information to assist a customer or potential customer to make informed choices about New Energy Tech.

Energy Network – Any of Australia’s principal energy transmission and distribution networks (including South West Interconnected System, North West Interconnected System, Darwin-Katherine Electricity Network, National Electricity Market).

Energy Supplier – Any of Australia’s public offer energy providers, including retailers and network businesses.

New Energy Tech are:

- a) small-scale (in-home or small business) products and systems that generate, store or trade energy away from Australia’s main transmission and distribution Energy Networks or as distributed energy resources connected to an Energy Network
- b) services that support or are closely related to those products and systems
- c) products, systems and services that monitor or manage a Customer’s usage of energy whether on or off an Energy Network
- d) any other product, system and service that the Administrator is satisfied is appropriately within this Code.

The term does not, however, include simple, low cost or off-the-shelf New Energy Tech that are within a class exemption made by the Administrator in accordance with paragraph 17 of the Annexure – Code Administration.

Examples of New Energy Tech are:

- e) distributed energy resources owned by or leased to the Customer that are connected to an Energy Network for supplementary supply such as solar photovoltaic systems, wind turbines, hydro and bioenergy generators
- f) a microgrid that may be connected or fully isolated from the Energy Network
- g) a power system for a single Customer, whether or not the Customer is also connected to an Energy Network

- h) energy management products, systems and services supplied to a Customer including home energy management systems and services, battery and other storage products, systems and services
- i) programs aimed at stabilising the supply of energy including by paying Customers an incentive to reduce their usage during critical peak periods or by shutting down or restricting the power consumption of Customer appliances during critical peak periods
- j) a Power Purchase Agreement
- k) person to person energy trading systems and services
- l) electric vehicle charging services
- m) suppliers of repair, maintenance and removal services for New Energy Tech products and systems.

These examples are not intended to limit the scope of the definition. Rather the term has been defined to accommodate new products and services as they enter the Australian market where the nature, complexity and cost is such that the Code protections are appropriate.

Owners Corporation – The body (however described) that has legal responsibility for the common property in a strata development.

Panel – The independent Code Monitoring and Compliance Panel appointed to oversee the work of the Code Administrator.

Power Purchase Agreement - An agreement for a Signatory to supply a customer with energy from New Energy Tech which may be from generation or storage equipment located on the customer’s premises or remotely. This is not intended to cover energy purchased through the wholesale electricity or gas markets.

Residential Customer – A customer that is purchasing New Energy Tech for personal, domestic or household purposes. The term includes an Owners Corporation for a residential strata property and the operator of a retirement village.

Small Business Customer – A customer that is a business or not for profit organisation that employs less than 20 people. Associated entities are taken to be one entity when calculating the number of employees.

Annexure – Code Administration

Introduction

- A1. The Code is administered in accordance with the Memorandum of Understanding agreed to on 24 January 2019 by Energy Consumers Australia, Energy Networks Australia, Public Interest Advocacy Centre, Clean Energy Council, Smart Energy Council, Australian Energy Council and Renew (MOU). The MOU provides that the governance, accountability and administration structure of the Code will be guided by the following principles:
- a) Customer focused
 - b) Fair and not anti-competitive
 - c) Relevant expertise
 - d) Independent and avoiding conflicts of interest
 - e) Inclusive
 - f) Adequately resourced.
- A2. The MOU specifies that the Code will be governed and administered by:
- a) The Council, which must comprise representatives of key stakeholders including industry associations and consumer bodies
 - b) The Steward, appointed by the Council to be the legal entity responsible for the Code, for entering into any contracts related to the Code and funding any shortfall in Code revenue
 - c) The Administrator, appointed by the Council and responsible for day to day administration of the Code
 - d) The Code Monitoring and Compliance Panel (Panel) appointed by the Council and comprising industry and consumer representatives and independent persons with relevant expertise.

This Annexure to the Code expands upon the role of the Administrator and the Panel and may be revised by the Council from time to time, following consultation with stakeholders.

Applications and renewals

- A3. The Administrator is responsible for developing application forms and renewal forms for use by industry participants wanting to become a signatory to the Code (Signatory) or renew their status as a Signatory.
- A4. Where an application is made by an industry participant and the application fee is paid, the Administrator must assess whether to admit the applicant as a Signatory. In making this assessment, the Administrator must take into account:
- a) whether the applicant's processes and documents are sufficient to support compliance by the applicant with the Code (other than a provision of the Code from which the Administrator has exempted the applicant)

- b) whether the key personnel in the applicant's business have had a significant involvement in another business that became insolvent.
- A5. Where a Signatory applies to renew their status as a Signatory, the Administrator may take into account any complaints that have been made about the Signatory, whether the Signatory has co-operated with the Administrator and Panel in carrying out their responsibilities and any other relevant factors.
- A6. Where an applicant is refused admittance or renewal as a Signatory, the Applicant has a right to appeal the Administrator's decision to the Panel (a fee may be payable by the Applicant).

Deferred payment arrangement providers

- A7. Where a Signatory requests the Administrator at any time until 30 June 2020 to approve a deferred payment contract for the purposes of paragraph 25(a)(ii)(B), the Administrator must do so if:
- a) an appropriately qualified person engaged by the Administrator reviews the deferred payment contract and certifies that the contract includes undertakings to comply with the consumer protections set out in paragraph 25(a)(ii)(A)(I) to (IV) ; and
 - b) the provider of the deferred payment arrangement pays the costs of the person engaged by the Administrator to undertake that work (costs to be paid to the Administrator in advance of the performance of the work).

Fees

- A8. The Council must, on an annual basis, agree to the fees and contributions required to cover the costs of operating the Council. These shared costs include the costs of the Independent Chair and the Consumer representatives. Industry members of the Council must cover the attendance costs of their own representatives. Council members may volunteer additional contribution but are not liable for any shortfall in funding to meet the costs of governing and administering the Code.
- A9. The Administrator, on an annual basis, must review the fees payable by applicants and annual and other fees payable by Signatories, with a view to cost recovery including Code governance and administration costs. As part of its annual budgeting process, the Administrator must propose a schedule of fees and contributions to the Council for approval, at least 3 months prior to the intended date of effect.
- A10. If the Council is not willing to endorse the fees proposal, the Steward must engage an independent accountant to review the reasonableness of the fees proposal in light of the budget for the Code and, if relevant, the extent of revenue shortfall that the Steward has indicated it is willing to fund. The Steward must bear the accountant's costs. Fees for the coming year will then be set by the Administrator taking into account any recommendations made by the independent accountant.
- A11. The Administrator must publish details of fees on the Code website. A change in fees is not effective until at least 3 months after publication of the new fee on the Code website.

Code promotion and branding

- A12. The Council and the Administrator must promote the benefits of the Code to customers, to industry participants and to other stakeholders.
- A13. The Council and the Administrator must develop Code brand mark guidelines for Signatories and publish these on the Code website. The Administrator must enforce compliance with these guidelines.
- A14. The Administrator must maintain an easily accessible list of Signatories on the Code website.

Supplementary materials

- A15. The Administrator may develop supplementary materials to assist Signatories to meet the expectations of the Code. These may include written standards, guidelines, approved Consumer Information Products, checklists, templates or training. They may apply to particular technologies or systems or address particular aspects of New Energy Tech that apply across many or all types.
- A16. These materials may include any combination of:
- a) Mandatory and binding standards which must be followed where they apply
 - b) Safe harbour guidelines which provide a Signatory with an approved method of complying with an aspect of the Code while allowing for other ways of compliance
 - c) Non-binding guidance, which may be of assistance to Signatories
 - d) Independent consumer information, designed to assist consumers to make informed choices
- A17. The Administrator must consult with stakeholders (including consumer representatives, industry and government) in the development of these materials. The period of consultation may vary and must be adequate to the importance and impact of the proposed materials. In the case of materials that are intended to be mandatory and to bind Signatories, the period of consultation must not be less than 3 months and may well be longer.
- A18. Where substantive disagreement emerges in the course of the consultation over mandatory or safe-harbour guidance, the Administrator may refer the proposed material to the Panel for decision. Where a Signatory makes an application for referral, the Administrator must refer the proposed material to the Panel for decision.

Exemptions

- A19. If an applicant or a Signatory applies to the Administrator for an exemption from a provision of the Code, the Administrator may agree to an exemption if satisfied that the exemption would not unduly diminish customer protection. For example, an exemption might be sensible if:
- a) an existing Code requirement was not appropriate to a proposed New Energy Tech or a trial involving new technology or a new offering
 - b) A product or service is a free additional 'value-added' service that does not materially impact the benefit of the core offering.
- A20. The Administrator, following consultation with stakeholders, may publish a class exemption. This does not require an individual application by a Signatory. A class exemption may set out conditions required for a Signatory to be able to rely on the exemption. (For example, it is intended that the Administrator will issue a class exemption to exempt simple, low-cost or off-the-shelf products or services (say priced below \$199) for which the Code consumer protections are not appropriate. The Administrator may also publish a class exemption that permits temporary customer trials of new offerings.) The Administrator must publish class exemptions on the Code website.
- A21. Any exemption (including a class exemption) must be for a fixed period and may only be extended following review by the Administrator.

Monitoring and investigations

- A22. The Administrator must monitor compliance with the Code. This might include undertaking regular compliance audits and reviews of Signatories' systems, policies and procedures, mystery shopping, assessing customer satisfaction, analysing customer complaints and investigating repeat instances. For example, the Administrator may conduct audits of sales conducted via direct marketing.
- A23. The Administrator must develop and publish a Complaints Procedure, consistent with Australian Standard AS ISO 10002, setting out the process where an allegation of breach of the Code is made. This must provide that:
- a) a complaint may be self-reported by a Signatory or made by Customers, another Signatory, regulators or others
 - b) if a complaint is made by a Signatory's Customer, the Administrator will investigate the complaint and, where appropriate, attempt to negotiate an outcome that is fair for both the Signatory and the Customer
 - c) where the Administrator is satisfied that a Signatory has breached the Code, the Administrator will determine what, if any, remedial action or sanction is appropriate
 - d) if the Signatory wishes to do so, the Signatory may ask the Panel to review a decision by the Administrator requiring the Signatory to take remedial action or imposing a sanction on the Signatory in response to a breach.
- A24. The Administrator has the power to require a Signatory to:
- a) rectify the issues that gave rise to the breach
 - b) train staff to minimise the likelihood of repeat breaches
 - c) require sales agents to undertake an assessment and accreditation process
 - d) appoint an external auditor, at the Signatory's cost, to audit areas of activity relevant to the breach (generally required if there are more than three major breaches in a 12-month period).

The Administrator also has the power to publicise the breach, including the name of the Signatory, on the Code website.

- A25. If the Administrator requires a Signatory to undertake remedial action in accordance with paragraph A24 a. to d., the Administrator must monitor the Signatory's compliance with that requirement.
- A26. If the Administrator considers that a Signatory has breached the Code in a way that may warrant the suspension or expulsion of the Signatory, the Administrator may refer the matter to the Panel for its consideration. For example, the Administrator may do this if the Signatory fails without reasonable excuse to undertake remedial action as required by the Administrator in accordance with paragraph A24 a. to d.
- A27. If the Administrator identifies an issue that may constitute a serious or systemic breach of law, the Administrator may refer the matter to the Panel to decide whether the matter should be referred to the relevant regulator.

Panel

- A28. The Panel is responsible for:

- a) overseeing the monitoring of compliance and enforcement of this Code by the Administrator
- b) reviewing a proposed mandatory or safe-harbour standard or guideline referred to it by the Administrator under paragraph A18
- c) reviewing a decision made by the Administrator requiring rectification of a breach (under paragraph A24), if the relevant Signatory requests a review
- d) reviewing a decision made by the Administrator to refuse admittance or renewal as a Signatory if requested under Paragraph A6
- e) deciding matters of suspension or expulsion referred under paragraph A26 to it by the Administrator
- f) referring serious or systemic breaches of law to relevant regulators under paragraph A27
- g) publishing on-line an annual report about the Code's operation. This must include reporting on Code compliance to enable assessment of the Code's effectiveness and extent to which the Code is promoting the confidence of the community in New Energy Tech. The report must also set out any exemptions from Code requirements agreed to by the Administrator. It must also include each finding of breach by the Administrator or Panel and the remedial action or sanction imposed on the relevant Signatory. This information must only identify the name of the relevant Signatory if the Signatory has been suspended or expelled
- h) every 3 years, engaging an independent body to undertake a review of the Code and its governance framework including by seeking the views of stakeholders (the review report must be published on the Code website) and revising the Code in light of that review.

Signatories' obligations to Administrator and Panel

- A29. A Signatory must ensure that it takes all reasonable steps to promote the benefits of this Code to Customers including prominent links to or a display of the latest version of this Code on its online presence.
- A30. A Signatory must promptly pay annual and any other Code-related fees applicable to it.
- A31. A Signatory must comply with the Code and all standards mandated by the Administrator in accordance with the Code.
- A32. A Signatory must co-operate with the Administrator and Panel in their exercise of their powers and responsibilities under the Code.